IN THE COURT OF APPEALS OF IOWA

No. 2-766 / 11-1768
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KRISTINA WALKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Kristina Walker appeals from her jury trial, conviction, and sentence for possession of a controlled substance, third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Stephen Japuntich and David A. Adams, Assistant Appellate Defenders, and Jessica Zachary and Christina I. Thompson, Student Legal Interns, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Andrea Petrovich, Assistant County Attorney, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

POTTERFIELD, P.J.

Kristina Walker appeals from her jury trial, conviction, and sentence for possession of a controlled substance, third offense. First, she contends trial counsel was ineffective in not seeking to suppress the crack cocaine on the grounds that her consent to search was involuntary. Second, she asserts the district court erred in denying her motion for judgment of acquittal because the evidence of knowing possession was insufficient for conviction. Third, she appeals the district court's denial of her motion for new trial on the same grounds. Finally, she appeals her sentence, contending the district court did not provide its rationale and imposed an improper sentence. We affirm, finding the failure to seek suppression of the evidence did not constitute ineffective assistance of counsel, the district court properly denied her motion for judgment of acquittal, the district court did not err in denying her motion for new trial, the district court gave adequate rationale for its sentence, and the sentence imposed was within the court's discretion.

I. Facts and Proceedings

Walker was pulled over for speeding in March of 2011. She produced her license and proof of insurance, but was unable to provide registration becuase she had recently purchased the vehicle. She was issued a citation for speeding and a warning that her license plates were invalid due to the lack of registration. Walker asked, "Am I done?" and the officer confirmed she was. The officer then asked if there were any "guns, knives, explosives, drugs, or anything like that in the car" before asking for consent to search. She replied, "I don't see why not," and exited the vehicle.

A second officer was present to stand with Walker while the first conducted the vehicle search. During the search, the officer found two small bags of white rocks in a cubby near the steering wheel. When asked what the substance was, Walker replied, "I don't do drugs and I'm not on drugs." A field test found the substance was probably crack cocaine and Walker was arrested and taken to jail.

Later that month by trial information, she was charged with possession of a controlled substance, third offense. Trial was held the following August. The two officers involved in the stop and search were the only witnesses. Entered into evidence were the two crack cocaine rocks and the laboratory report confirming their substance. After the close of evidence, Walker moved for judgment of acquittal, which was denied. The jury found her guilty of possession of a controlled substance, crack cocaine. She then filed a motion for a new trial and motion for arrest of judgment, asserting the verdict was contrary to the weight of evidence. This was also denied. The court sentenced her to an indeterminate term of up to five years in prison and suspended the minimum fine. She now appeals.

II. Analysis

A. Ineffective Assistance of Counsel

We review ineffective-assistance-of-counsel claims de novo. *State v. Reynolds*, 670 N.W.2d 405, 414 (Iowa 2003). "Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Failure to prove either

element is fatal to the claim. *Id.* While we generally preserve such claims for postconviction relief, if the record demonstrates "the defendant cannot prevail on such a claim as a matter of law," we will affirm the conviction without preserving the claim. *Id.* Conversely, if the record on appeal establishes both elements, we will reverse the conviction and remand for a new trial. *Id.* Counsel is not required to raise a meritless issue. *Id.* We begin with the presumption that counsel was competent. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). We find in our de novo review that the record is sufficient to determine the facts and the law with which counsel was confronted, and that counsel had no obligation to pursue a motion to suppress the consent search.

Walker contends counsel was ineffective in faileding to move to suppress the drugs seized from her car. She claims her consent to search—given after she was issued a ticket and informed the stop was over—was involuntary under article 1, section 8 of the Iowa Constitution. She notes her stop was orchestrated toward a goal of searching her car, pointing to the officer's statement to his backup officer that he intended to perform a "consent search." Such a systemic approach to a vehicle search, she argues, has gained widespread use among law enforcement, is inherently involuntary, and is "intentionally deceitful." While she may have been told she was free to leave, Walker puts forth that she was instead engaged in a seamless "old highway patrol two step."

She argues her counsel failed to stay abreast of legal arguments that might apply to the facts of her case. In support of this proposition, she points to a dissent from a case from the Wisconsin Supreme Court, an Ohio Court of

Appeals decision, a treatise, and a law review article disapproving of the orchestrated stop technique. She also argues Iowa precedent does not foreclose such an argument.

It is counsel's responsibility to stay abreast of legal developments in order to render effective assistance. *State v*. *Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). However, "an attorney need not be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v*. *Schoelerman*, 315 N.W.2d 67, 74 (Iowa 1982). Where there has been no previous occasion to rule on the issue and the objection is novel, we will not find counsel ineffective. *State v*. *McKetterick*, 480 N.W.2d 52, 59 (Iowa 1992).

In *Schoelerman*, the court noted that while an attorney need not predict the future, he should have challenged the charge against his client where:

> there were no decisions of this court which foreclosed the issue in question, and indeed the specificity of the language in the theft by bad check statute would have lent substantial weight to an argument that defendant had been mischarged. Furthermore, had trial counsel consulted cases from other jurisdictions, he would have found little or nothing to discourage him from raising the issue.

315 N.W.2d at 74. Walker claims her position is not foreclosed by current precedent, reciting and explaining away on nuances of fact several Iowa appellate cases. Finally, Walker cites to only two cases to support her proposition, and one of these is a dissent. This is a far cry from "little or nothing to discourage" her attorney from raising the issue.

In its recent decision in *State v*. *Pals,* 805 N.W.2d 767, 779-80 (Iowa 2011), (decided, as the petitioner notes, shortly after the trial in this case), our

supreme court reviewed Iowa precedent regarding article I, section 8 of the Iowa constitution in the context of a consent to search.

> In *Reinders*, . . . we did consider claims brought under both the Fourth Amendment and article I, section 8 of the Iowa Constitution in a search and seizure case involving consent. The accused in *Reinders* was approached by police in a K-Mart parking lot. After asking the accused about his activities and requesting identification, police asked for consent to search. The court found the consent valid, noting that there was "no show of authority, no intimidation, and no use of physical force. . . . The officers simply engaged him in conversation and asked for identification." While the opinion states that the court found "no basis to distinguish the protections afforded by the Iowa Constitution," it is not clear from the opinion precisely what distinctive arguments, if any, were raised on appeal.
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> We have also considered the validity of consent in search and seizure cases involving automobiles. In *State v. Smith*, 217 N.W.2d 633, 634 (Iowa 1974), we were asked if a consent was voluntary during a traffic stop. In *Smith*, the defendant alighted from his car and approached the officers after being pulled over. After reviewing the defendant's driver's license, an officer asked if the officers could search the car. The search was found voluntary under *Schneckloth*. Further, in a case prior to *Schneckloth*, we held that a consent to search during a vehicle stop was voluntary under the Fourth Amendment after the driver was asked to step out of the car even though the officer had drawn his gun when approaching the vehicle as a precaution in light of reports of an armed suspect.

Pals, 805 N.W.2d at 767, 780 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)). The court concluded in *Pals* that *Schneckloth* provided the appropriate framework for determining voluntariness of consent and that Pals' consent to search his truck following the traffic stop was involuntary. *Id.* at 782. The court went on to state Pals' consent would have more likely been ruled voluntary had Pals not been patted down, had remained in his own vehicle, and had been told he was free to leave. *Id.*, at 783. The facts here, under *Pals*, do not support a finding of involuntariness of Walker's consent. Therefore, given the available

precedent at the time of trial—as well as afterwards—we cannot not find Walker's counsel failed to perform a fundamental duty in failing to move to suppress the confiscated drugs. *See Graves*, 668 N.W.2d at 869. Walker was not provided with ineffective assistance of counsel. *See id.*

B. Motion for Judgment of Acquittal

Walker next appeals the denial of her motion for judgment of acquittal. At trial and on appeal, Walker asserts sufficient evidence was not shown that she actually or constructively possessed the drugs which were found in her vehicle.

We review the denial of a motion for judgment of acquittal for the correction of errors at law. *State v*. *Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). A guilty verdict must be supported by substantial evidence, which is the amount of evidence upon which a rational trier of fact could find a defendant guilty beyond a reasonable doubt. *Id.* We consider all of the evidence in our review, viewed in the light most favorable to the State and including any legitimate inferences or presumptions that may fairly or reasonably be deduced from the evidence. *Id.*

Walker contends the evidence presented at trial was not sufficient to support a finding that she either actually or constructively possessed the crack cocaine. The evidence presented showed she was the sole owner of the car, and that she was alone in the car when it was stopped. The drugs were found in a cubby hole near the steering wheel—within reach of where she was seated, but not directly on her person. Officers reported her demeanor was nervous and defeated.

Because the crack cocaine was not found within Walker's direct physical control (i.e. on her person), the State needed to prove she had constructive possession of the drugs. *See State v*. *Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). "Possession is constructive where the defendant has knowledge of the presence of the drugs and has the authority or right to maintain control of them." *Id.* In *Cashen*, the Iowa Supreme Court found an inference of possession was not warranted because the defendant did not have exclusive possession of the premises and did not have exclusive access to the place the drugs were found. *Id.* at 571. Instead the drugs were found in the back seat and the vehicle contained five other people. *Id.* Thus the State was required to introduce other evidence proving actual knowledge and authority or right to maintain control over the drugs. *Id.*

Walker's case was directly contrary to this scenario. Walker was the only person who owned the car, the only person in it at the time of the stop, and the drugs were in close proximity—next to the steering wheel. This, paired with the circumstances of the arrest, viewed in the light most favorable to the State including all legitimate inferences or presumptions that could reasonably be deduced therefrom, constituted substantial evidence of possession. *See Serrato*, 787 N.W.2d at 465.

C. Motion for New Trial

Walker contends her motion for new trial was improperly denied, because the jury verdict finding she possessed the crack cocaine was contrary to the evidence. We review motions for new trial for abuse of discretion, granting the district court broad discretion in its decision to grant or deny a motion for new

trial. *State v*. *Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Walker contends we can find the possession issue differently under her motion for new trial because we do not view the evidence in the light most favorable to the State. Even without viewing the evidence this way, given the precedent and evidence outlined above, we find the district court did not abuse its discretion in denying Walker's motion for new trial.

D. Sentencing

Walker first contends the district court did not properly state its reasons on the record for her sentence.

> The Iowa Rules of Criminal Procedure require the district court to state on the record its reason for selecting the particular sentence it imposes. Although the reasons do not need to be detailed, they must be sufficient to allow appellate review of the discretionary action. Appellate review of a sentencing decision is for an abuse of discretion.

State v. *Evans*, 671 N.W.2d 720, 727 (Iowa 2003). In its sentencing, the court noted it considered Walker's

> prior record of convictions and deferments, employment circumstances, her mental health and substance abuse history, her family circumstances, the nature of the offense that was committed here and there was no victim other than herself probably, there was no weapon or force involved . . . her need for rehabilitation and potential for that, and necessity for protecting the community from further offenses from the defendant . . . .

The court concluded with its sentence, stating: "Ms. Walker, I am going to sentence you to prison on this offense for five years." While the district court did not explicitly lay forth each prior offense and go into great detail as to how each factor weighed in favor of a five-year prison sentence, we find its rationale is sufficient to allow our review of the discretionary action. *See id.*

Next Walker contends the particular sentence imposed constituted an abuse of the district court's discretion. An abuse of the sentencing court's discretion occurs where "discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v*. *Sailer*, 587 N.W.2d 756, 759 (Iowa 1998). Walker requested two years' probation with mental health supervision and assistance. Walker contends the court ignored mitigating factors including her willingness to enter mental health treatment and that her two prior drug possession convictions were for marijuana. The court's decision to sentence Walker to five years in spite of these factors does not rise to the level of "untenable" or "clearly unreasonable."

AFFIRMED.